

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FLOYD TALBERT,)	
)	
Claimant,)	IC 02-008055
)	
v.)	
)	
ALLIED FORCES,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSION OF LAW,
and)	AND RECOMMENDATION
)	
CNA INSURANCE COMPANY,)	Filed April 3, 2006
)	
Surety,)	
)	
Defendants.)	
)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on November 15, 2005. Claimant was present and represented by Lawrence E. Kirkendall of Boise. Mark S. Peterson, also of Boise, represented Employer/Surety. Oral and documentary evidence was presented. There were no post-hearing depositions; however, the parties submitted post-hearing briefs and this matter came under advisement on February 22, 2006.

ISSUES

As agreed to by the parties at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits in excess of impairment, and,
2. Whether the injuries Claimant suffered in a bicycle accident subsequent to his industrial accident are compensable.

Claimant withdrew issue number 2 above in his post-hearing brief.

CONTENTIONS OF THE PARTIES

Claimant, a roofer, contends that as a result of an industrial accident where he fell off a roof and fractured his left heel and right femur, he is no longer able to return to his chosen vocation and has suffered disability inclusive of his impairment of at least 51% of the whole person.

Defendants contend that according to their retained vocational expert, Claimant has suffered no wage loss but has suffered some loss of access to his pre-injury labor market and, consequently, has suffered disability inclusive of impairment of 26-28% of the whole person.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing; and
2. Joint Exhibits 1-17 admitted at the hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 50 years of age at the time of the hearing and resided in Laughlin, Nevada, where he was working as a kitchen worker in a casino.
2. For the majority of Claimant's work life, he has been a roofer/construction worker. On April 30, 2002, Claimant fell backward off a scaffold approximately 12-14 feet high and landed at a 45-degree angle on his feet. He severely fractured his right femur and left heel. He also suffered an injury to his right knee. Claimant was earning \$7.50 an hour at the time.

3. An infection in Claimant's left heel that required surgery, bilateral pulmonary emboli that required Coumadin therapy, and a hernia in his right thigh that required surgery complicated his course of recovery. Nonetheless, he participated in physical therapy and a work-hardening program and was declared to be at MMI on March 18, 2003, and assigned a 14% whole person permanent partial impairment (PPI) rating that Surety accepted and paid.

4. On June 23, 2003, Claimant re-fractured his right femur when he fell attempting to mount his mountain bike. A rod was inserted in his femur from his hip to above his knee. This injury did not result in any additional impairment or restrictions.

5. Claimant retained Douglas Crum, C.D.M.S., to assist him with vocational issues. Mr. Crum met with Claimant, reviewed medical and ICRD records and authored two reports, one dated October 24, 2003, (first report), and one dated April 20, 2004, (second report). In his first report, Mr. Crum reviewed a "valid" Key Functional Capacity Evaluation (FCE) conducted on March 17, 2003, that placed Claimant in the medium-to-medium-heavy work category. The FCE recommended that Claimant could work 4-5 hours standing with frequent positional changes and breaks; 4-5 hours sitting with regular breaks; walking 4-5 hours with regular breaks and occasional squatting, crawling, climbing stairs, and balancing.

6. Mr. Crum noted that one of Claimant's treating physicians, Kevin R. Krafft, M.D., a physiatrist, imposed the following restrictions: occasionally lifting up to 75 pounds, no squatting or kneeling, avoid unprotected heights, and no walking on rough or uneven ground. Dr. Krafft indicated that the lifting restriction might be potentially advanced over time. Another of Claimant's treating physicians (for the right femur fracture), Jeffery P. Menzner, M.D., indicated that Claimant might have long-term problems from his femur fractures but that Claimant could return to work commensurate with the FCE.

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7. Mr. Crum reported Claimant's educational background as follows: 1972 high school graduate, 40 college credits over two and a half years in accounting, bookkeeping, and horticulture. Claimant completed a six-month welding program,¹ a six-month bookkeeping-training program, and three 15-hour courses in computer skills at a local business college in connection with his work with ICRD consultant Bob Reidelberger in 2003.

8. Mr. Crum reported Claimant's work history as primarily a roofer; however, Claimant also has experience as a laborer, construction worker, equipment operator, tile installer, assembly line production worker, and a customer service representative. Claimant indicated to Mr. Crum that he had a vocational interest in cabinet making or shipping and receiving.

9. Mr. Crum concluded in his first report that Claimant would not be able to return to work as a roofer, carpenter, or tile layer due to his restrictions. While Mr. Crum did not believe that Claimant suffered any actual wage loss, he did believe that he suffered a loss in wage earning capacity that he would have been able to earn as a roofer or carpenter of between 25%-34%. Mr. Crum further opined that Claimant has lost access to 39% of his pre-injury labor market. He then concluded that Claimant has experienced a PPD rating of approximately 34% of the whole person inclusive of his 14% whole person PPI.

10. In his second report, Mr. Crum factored in the physical restrictions imposed by Ronald Kristensen, M.D., the orthopedic surgeon who treated Claimant's fractured left heel. According to the ICRD case notes prepared by Mr. Reidelberger, Dr. Kristensen would not allow Claimant to return to roofing and assigned permanent restrictions of no lifting over 50 pounds, minimize walking on uneven ground, and avoiding steep pitches.² Based on Dr. Kristensen's

¹ Claimant testified that he is a certified welder, but had only briefly worked as a welder due to his intolerance to the fumes and confining working conditions.

² The Referee is unable to locate within the medical records in evidence the restrictions imposed by Dr. Kristensen, but has no reason to doubt the accuracy of Mr. Reidelberger's case notes in that regard.

50-pound lifting restriction, Mr. Crum increased Claimant's loss of access from 39% to 79%. Mr. Crum also increased Claimant's loss of earning capacity from between 25%-34% to between 40%-45%. He then increased Claimant's PPD from approximately 34% to approximately 51% inclusive of PPI, " . . . a number which represents the average of the mid-point of the losses of labor market access and loss of wage earning capacity." Joint Exhibit 6, p. 607.

11. Defendants obtained the services of Bill Jordan, M.A., C.R.C., C.D.M.S., to assist them with vocational issues. Mr. Jordan met with Claimant, reviewed medical and ICRD records, met personally with Claimant's three treating physicians, and authored an "Employability Report" dated September 30, 2005. Mr. Jordan reported that Claimant's five-year pre-accident salary history totaled \$10,359 annually, or \$4.98/hour based on the normal 2,080-hour work year. He further noted that Claimant generally was off work during the winter months and received unemployment compensation benefits. Claimant testified that he did not look for other work during his winter layoffs. Therefore, Mr. Jordan concluded that there is no lost wages in this case as there are numerous jobs available to Claimant to restore his time-of-injury wage of \$7.50 an hour.

12. Mr. Jordan met with Dr. Menzner who treated Claimant's femur fracture. Dr. Menzner informed Mr. Jordan that Claimant could return to work as a roofer, carpenter, or in construction with regard to his femur injury, however he should wear kneepads. Mr. Jordan also met with Dr. Kristensen who treated Claimant's left heel fracture. Dr. Kristensen informed Mr. Jordan that he agreed with Dr. Krafft's 14% whole person PPI rating. He opined that Claimant could work on scaffolding and ladders occasionally (up to 1/3 of the work day) but that uneven ground and pitched roofs would be difficult. Dr. Kristensen would approve Claimant's return to his time-of-injury job with those modifications. Mr. Jordan also met with physiatrist

Dr. Krafft whose primary concern was working at unprotected heights; he recommended a railing, safety harness or cage.

13. Based on his review of the relevant information and utilizing both the Boise area and Laughlin-Bullhead-Kingman area labor markets, Mr. Jordan concluded that Claimant has incurred PPD of between 26%-28% inclusive of impairment.

DISCUSSION AND FURTHER FINDINGS

“Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. “Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

14. The Referee is concerned that Claimant believes he is more disabled than the objective evidence demonstrates. For example, the medical records are replete with instances where Claimant would balk at doing medically requested procedures or movements of various kinds because it might “hurt.” He also had many pain complaints during the course of the FCE. At hearing, Claimant went through a list of jobs that Mr. Jordan deemed feasible for him and indicated he could not do most of them due to “hurt” or “pain” issues, even though his physicians had approved them outright or with modifications. While Claimant might have some difficulty performing “full-fledged” roofing, with his experience he should be able to find some aspect of that profession for which he is suited such as cost estimator, customer service or supervising. Further, Claimant has expressed an interest in and talent for woodworking that brings up a whole area of potential employment in woodworking or cabinet shops where he could easily restore any actual loss of wages or wage earning capacity. According to Claimant’s tax returns, Claimant was not a high-income earner before his accident. He argues that his tax returns do not accurately reflect his pre-injury earnings and invites the Referee to, in essence, double his reported earnings to reflect “under-the-table” income. The Referee declines to accept the invitation. The Referee is of the opinion that Claimant is currently under-employed as a kitchen

helper;³ he is much more talented than that. He presented well at hearing; he was personable and articulate. However, the Referee questions his sincerity and motivation in returning to employment wherein he might “hurt” or feel pain at the end of the day. His subjective complaints are certainly to be considered in a disability analysis, but here, Claimant’s subjective complaints are not consistent with the objective medical evidence concerning his limitations.

15. Nonetheless, the Referee finds that Claimant has lost a certain portion of his pre-injury labor market, including some aspects of roofing. Further, Claimant’s age (50) should be considered as a factor weighing against him when he competes for job openings with younger, healthier applicants. The Referee finds that Mr. Jordan’s analysis of Claimant’s employability is closer to the reality of Claimant’s employment situation than that of Mr. Crum’s, whose report is based in part on his opinion that Claimant was making more money pre-injury than was actually the case. He also upped his PPD rating on additional “restrictions” apparently given by Dr. Kristensen. However, those additional restrictions were merely forecasts of what Dr. Kristensen believed would be the case once Claimant achieved MMI. Dr. Krafft’s restrictions along with the FCE are given more weight than Dr. Kristensen’s forecast. When taking into account those factors set forth in Idaho Code §§ 72-425 and 430, as well as the three vocational rehabilitation reports, the Referee finds that Claimant has incurred PPD of 30% of the whole person inclusive of his PPI as a result of his April 30, 2002, accident and injuries.

CONCLUSION OF LAW

Claimant has proven his entitlement to PPD of 30% of the whole person inclusive of his 14% whole person PPI.

³ Claimant testified he earns \$6.00 an hour as a kitchen worker through a temporary employment agency. He left Boise in April 2004 and moved to Laughlin to care for his ailing mother.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 22nd day of March, 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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_____/s/_____

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